

1 BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
2 WESTERN WASHINGTON REGION  
3 STATE OF WASHINGTON  
4

5 C. DEAN MARTIN,

6  
7 Petitioner,

8 v.  
9

10 WHATCOM COUNTY,

11 Respondent.  
12  
13

Case No. 11-2-0002

**FINAL DECISION AND ORDER**

14 **I. PROCEDURAL BACKGROUND**

15 *PETITION FOR REVIEW*

16  
17 On February 4, 2011, C. Dean Martin (Petitioner) filed a Petition for Review (PFR). The  
18 PFR challenges Whatcom County's (County) adoption of Ordinance 2010-065 which  
19 amended Whatcom County's Title 20 zoning map to rezone approximately 770 acres  
20 adjacent to the Birch Bay Urban Growth Area (UGA) from Rural One Unit Per Ten Acres  
21 (R10) to Rural One Unit Per Five Acres (R5).  
22

23 *MOTIONS*

24 On May 11, 2011 in response to a County motion, the Board dismissed those portions of  
25 Issues 1, 3 and 6 which alleged a violation of RCW 36.70A.170 and 36.70A.177. In  
26 addition, Issue 5 was dismissed in its entirety.  
27

28 *HEARING ON THE MERITS*

29  
30 The Hearing on the Merits was held on June 27, 2011, in Bellingham, Washington. Board  
31 members James McNamara, William Roehl and Nina Carter, were present; Board Member  
32

1 McNamara presiding. Petitioner C. Dean Martin was represented by Tom Ehrlichman;  
2 Whatcom County was represented by Karen Frakes.

## 3 4 **II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF, 5 AND STANDARD OF REVIEW**

6 Pursuant to RCW 36.70A.320(1), comprehensive plans and development regulations, and  
7 amendments to them, are presumed valid upon adoption.<sup>1</sup> This presumption creates a high  
8 threshold for challengers as the burden is on the petitioner to demonstrate that any action  
9 taken by the County is not in compliance with the GMA.<sup>2</sup>

10  
11 The Board is charged with adjudicating GMA compliance and, when necessary, invalidating  
12 noncompliant plans and development regulations.<sup>3</sup> The scope of the Board's review is  
13 limited to determining whether a County has achieved compliance with the GMA only with  
14 respect to those issues presented in a timely petition for review.<sup>4</sup> The GMA directs that the  
15 Board, after full consideration of the petition, shall determine whether there is compliance  
16 with the requirements of the GMA.<sup>5</sup> The Board shall find compliance unless it determines  
17 that the County's action is clearly erroneous in view of the entire record before the Board  
18 and in light of the goals and requirements of the GMA.<sup>6</sup> In order to find the County's action  
19 clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake  
20 has been committed."<sup>7</sup>

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23  
24 <sup>1</sup> RCW 36.70A.320(1) provides: [Except for the shoreline element of a comprehensive plan and applicable  
25 development regulations] comprehensive plans and development regulations, and amendments thereto,  
26 adopted under this chapter are presumed valid upon adoption.

27 <sup>2</sup> RCW 36.70A.320(2) provides: [Except when city or county is subject to a Determination of Invalidity] the  
28 burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this  
29 chapter is not in compliance with the requirements of this chapter.

30 <sup>3</sup> RCW 36.70A.280, RCW 36.70A.302

31 <sup>4</sup> RCW 36.70A.290(1)

32 <sup>5</sup> RCW 36.70A.320(3)

<sup>6</sup> RCW 36.70A.320(3)

<sup>7</sup> *City of Arlington v. CPSGMHB*, 162 Wn.2d 768, 778, 193 P.3d 1077 (2008)(Citing *Dept. of Ecology v. PUD District No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 1993); See also, *Swinomish Tribe, et al v. WWGMHB*, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007); *Lewis County v. WWGMHB*, 157 Wn.2d 488, 497-98, 139 P.3d 1096 (2006)

1 In reviewing the planning decisions of cities and counties, the Board is instructed to  
2 recognize "the broad range of discretion that may be exercised by counties and cities" and  
3 to "grant deference to counties and cities in how they plan for growth."<sup>8</sup> However, the  
4 County's actions are not boundless; their actions must be consistent with the goals and  
5 requirements of the GMA.<sup>9</sup>  
6

7  
8 Thus, the burden is on the Petitioner to overcome the presumption of validity and  
9 demonstrate the challenged action taken by Whatcom County is clearly erroneous in light of  
10 the goals and requirements of the GMA.  
11

### 12 **III. BOARD JURISDICTION**

13 The Board finds the Petition for Review was timely filed, pursuant to RCW 36.70A.290(2).  
14 The Board finds Petitioner has standing to appear before the Board, pursuant to RCW  
15 36.70A.280(2). The Board finds it has jurisdiction over the subject matter of the petition  
16 pursuant to RCW 36.70A.280(1).  
17

### 18 **IV. PRELIMINARY MATTERS**

19  
20 At the Hearing on the Merits Petitioner offered several illustrative exhibits, despite the  
21 request by the Board that illustrative exhibits be exchanged by 3 p.m. on June 24, 2011. It  
22 appears several of these exhibits were provided to the County after 3 p.m. However, as the  
23

24 <sup>8</sup> RCW 36.70A.3201 provides, in relevant part: In recognition of the broad range of discretion that may be  
25 exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the  
26 boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements  
27 and goals of this chapter. Local comprehensive plans and development regulations require counties and cities  
28 to balance priorities and options for action in full consideration of local circumstances. The legislature finds that  
29 while this chapter requires local planning to take place within a framework of state goals and requirements, the  
30 ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and  
31 implementing a county's or city's future rests with that community.

32 <sup>9</sup> *King County v. CPSGMHB*, 142 Wn.2d 543, 561, 14 P.2d 133 (2000)(Local discretion is bounded by the  
goals and requirements of the GMA). See also, *Swinomish*, 161 Wn.2d at 423-24. In *Swinomish*, as to the  
degree of deference to be granted under the clearly erroneous standard, the Supreme Court has stated: The  
amount [of deference] is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give  
the [jurisdiction's] actions a "critical review" and is a "more intense standard of review" than the arbitrary and  
capricious standard. *Id.* at 435, Fn.8.

1 County indicated there would be no prejudice, the exhibits will be admitted for illustrative  
2 purposes only.

3  
4 In his Reply Brief Petitioner asked the Board to take official notice of a pending legislative  
5 rezone and SEPA determination on a 50 acre rural area, currently zoned R-10 and  
6 proposed for R-5<sup>10</sup>. In support of this request, Petitioner cited WAC 242-02-670(1). That  
7 WAC section provides the Board may officially notice:

- 8 (1) Business customs. General customs and practices followed in the transaction  
9 of business.

10  
11 It is not clear how this WAC section would apply in this context. In any event, the Board  
12 declines to notice a pending action, which may well never be approved by the County.

## 13 14 **V. ISSUES AND DISCUSSION**

### 15 *The Challenged Action*

16  
17 Petitioner challenges Whatcom County Ordinance Number 2010 – 065. The Ordinance  
18 changed the zoning of 770 acres of land east of the Birch Bay urban growth area from R-10  
19 to R-5.

20  
21 As set out in the Prehearing Order, the Issues in this case are as follows:

- 22 1. Failure to Adopt and Implement a Resource Land Program.  
23 Did the county's adoption of the Birch Bay Rezone fail to comply with the Growth  
24 Management Act Goals, RCW 36.70A.020(2), (8), (10), and (11) and the  
25 requirements of GMA, RCW 36.70A.040, .070(5), .140, .170 and WAC 365-190-050,  
26 WAC 395-190-480(1)(a), (1)(f), -815, as follows:  
27 a. By allowing increased density of rural lands designated with the "Agricultural  
28 Protection Overlay" as shown on Map #19 of the Comprehensive Plan ("APO"  
29 or "APO Lands"), without lands of long-term commercial significance, as  
30 required by RCW 36.70A.170, that takes into consideration the guidelines  
31 established under RCW 36.70A.050, appearing at WAC 365-190-050, and  
32 WAC 365-196-480, -815?

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<sup>10</sup> Petitioner's Reply Brief at 7.

- 1 b. By doubling the density of a rural land designated APO, without first having  
2 adopted clear criteria and a public process for classifying and dedesignating  
3 agricultural resource lands of long-term commercial significance?  
4 c. By upzoning APO Lands for increased density without first amending its  
5 comprehensive plan and development regulations to make clear to  
6 landowners, the public, the County and this Board, the following:  
7 i. Which APO lands designated under the comprehensive plan maps, the  
8 zoning map and development regulations are "agricultural resource  
9 lands of long-term commercial significance" as defined in RCW  
10 36.70A.030 and WAC 365-190-30?  
11 ii. Which comprehensive plan policies and/or development regulations  
12 establish the exact criteria and definitions for determining which APO  
13 lands are GMA "agricultural resource lands of long-term commercial  
14 significance"?  
15 iii. The number of acres Countywide that are protected under the APO  
16 designation as "agricultural resource lands of long-term commercial  
17 significance" as defined in RCW 36.70A.030 and WAC 365-190-030?  
18 and/or  
19 d. The County improperly made its decision to double the density of APO lands  
20 based solely on landowner dissatisfaction at being excluded from the Urban  
21 Growth Area and zoned for ten-acre minimum lot sizes ("landowner intent"),  
22 rather than the characteristics of the land and surrounding area under  
23 appropriate GMA resource land designation criteria.
- 24 2. Inconsistency with the Comprehensive Plan.  
25 Did the County's adoption of the Birch Bay Rezone fail to comply with the Growth  
26 Management Act Goals, RCW 36.70A.020(2), (8) and the requirements of GMA,  
27 RCW 36.70A.040(3), .130(1)(d), and WAC 365-195-800(1), -810 because the  
28 amended development regulation is not consistent with the Whatcom County  
29 Comprehensive Plan, including but not limited to the following designations, goals  
30 and policies:  
31 a. Map #19: Land still designated "Agricultural Protection Overlay" (protecting  
32 continued long term agricultural viability)  
b. Plan Policy 2DD-5: "Use an "Agriculture Protection Overlay Zone" designation  
in certain Rural zoned areas as a way to help achieve the goal of conserving  
and enhancing Whatcom County's agricultural land base;"  
c. Policy 2DD-10: "Rezoning from one dwelling unit per ten acre (R10A) zoning  
districts to one dwelling per five acre (R5A) zoning districts should be  
discouraged."  
d. Goal 8A and Policy 8A4: Discourage conversion of productive agricultural land  
to incompatible nonagricultural uses;  
e. Goal 2DD and discussion of Urban Growth Areas: Conversion of rural land  
from R10A to R5A zoning;

- 1 f. Policies 2K-1: Restricting land uses in 100-year floodplains to low-intensity  
2 uses such as open space corridors and agriculture;
- 3 3. Lack of Disclosure, Lack of Required Analysis and Public Participation Violations.  
4 Did the County's adoption of the Birch Bay Rezone fail to comply with the Growth  
5 Management Act Goals, RCW 36.70A.020(2), (8), (10) and (11) and the  
6 requirements of GMA, RCW 36.70A.130(1), .140, and .170, and WAC ch. 365-196  
7 because:
- 8 a. Ordinance No. 2010-065 fails to include any findings or conclusions revealing  
9 that the rezone area is designated by the comprehensive plan as an  
10 Agricultural Protection Overlay, in Plan Map #19.
- 11 b. The record of the County's action fails to include any analysis of:
- 12 i. The APO lands rezoned by this action to determine whether they qualify  
13 as "agricultural resource lands of long-term commercial significance" as  
14 defined in RCW 36.70A.030;
- 15 ii. Whether doubling the density on the APO lands to allow 5-acre  
16 parcelization would result in create greater conflicts with continued  
17 agricultural uses on adjoining lands and result in a reduction of  
18 agricultural uses on the land previously zoned with a 10-acre minimum  
19 lot size
- 20 iii. Specific characteristics of the rezoned land, i.e., whether it continues to  
21 qualify for protection as agricultural land, instead basing the decision on  
22 a concern for landowner intent and displeasure with being denied on  
23 urban growth area designation;
- 24 iv. Compliance with applicable comprehensive plan goals and policies;  
25 and/or
- 26 v. Analyzing how a change from Rural 10-acre density to Rural 5-acre  
27 density would protect critical areas, protect rural character, protect  
28 surface and groundwater resources or protect against conflicts with the  
29 use of agricultural resource lands of long term commercial significance,  
30 as required by the GMA Goals, RCW ch. 36.70A, and RCW  
31 36.70A.060, .070, .170; and/or
- 32 c. The County did not provide effective public notice stating that its planned  
rezone could affect APO Lands and therefore agricultural lands of long term  
commercial significance, as required by WAC 365-196-600(6)(b).
4. Did the County's adoption of the Birch Bay Rezone fail to comply with SEPA, RCW  
ch. 43.21C and its implementing regulations at WAC ch. 197-11, because the County  
did not perform the analysis required by SEPA and/or adequately mitigate for impacts  
on agricultural lands, critical areas, surface runoff and stormwater, and water quality,  
including a failure to provide the analysis required on issues 2 and 3, above, thus  
resulting in unmitigated probable significant adverse environmental impacts?
5. Did the County's adoption of the Birch Bay Rezone fail to comply with RCW  
36.70A.070(5)(a) because it effectively removes lands from the APO designation (a

comprehensive plan designation, at Map #19) and allows subdivision into five-acre parcels, without first analyzing and documenting how the ordinance “harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of this chapter.”?

6. Did the County’s adoption of the Birch Bay Rezone fail to comply with RCW 36.70A.177 and WAC 365-196-815 because it amended development regulations without conserving agricultural lands and encouraging the agricultural economy and it failed to limit nonagricultural uses of agricultural resource lands of long-term commercial significance to lands with poor soils or otherwise not suitable for agricultural production?

Despite detailed issue statements, many of these issues were not developed in the briefing.

An issue that is not briefed by a petitioner is **deemed abandoned**. *WEC v. Whatcom County*, WWGMHB Case No. 95-2-0071 (Final Decision and Order, December 20, 1995); *OEC v. Jefferson County*, WWGMHB Case No. 94-2-0017, Final Decision and Order, February 16, 1995. Fairness requires that an issue must be addressed in the Petitioner's opening briefing or the respondent will not have an opportunity to respond to it.

Rather, as argued in his briefing, Petitioner’s allegations can be summarized as follows:

- a) The County failed to include in the record any analysis of the rezone of approximately 770 acres adjacent to the Birch Bay Urban Growth Area (UGA) from Rural One Unit Per Ten Acres (R10) to Rural One Unit Per Five Acres (R5) and this has diminished protection of Agricultural Land of Long Term Commercial Significance (ALLTCS);
- b) In the absence of that analysis the process failed to afford the public a meaningful opportunity to understand the loss of ALLTCS protections;
- c) The County failed to conduct any review of environmental impacts to ALLTCS, as required by the State Environmental Policy Act (SEPA); and
- d) The upzone was inconsistent with the County's adopted Comprehensive Plan policies disfavoring rezones from R-10 to R-5.<sup>11</sup>

## **A. Protection of Agricultural Lands of Long Term Commercial Significance**

### **Applicable Law**

<sup>11</sup> Petitioner’s Opening Brief at 1.

1 RCW 36.70A.060 provides, in part:

2 (1)(a) Except as provided in \*RCW 36.70A.1701, each county that is required or chooses to  
3 plan under RCW 36.70A.040, and each city within such county, shall adopt development  
4 regulations on or before September 1, 1991, to assure the conservation of agricultural,  
5 forest, and mineral resource lands designated under RCW 36.70A.170. Regulations  
6 adopted under this subsection may not prohibit uses legally existing on any parcel prior to  
7 their adoption and shall remain in effect until the county or city adopts development  
8 regulations pursuant to RCW 36.70A.040. Such regulations shall assure that the use of  
9 lands adjacent to agricultural, forest, or mineral resource lands shall not interfere with the  
10 continued use, in the accustomed manner and in accordance with best management  
11 practices, of these designated lands for the production of food, agricultural products, or  
12 timber, or for the extraction of minerals.

13 \*\*\*

14 (2) Each county and city shall adopt development regulations that protect critical areas  
15 that are required to be designated under RCW 36.70A.170. For counties and cities that are  
16 required or choose to plan under RCW 36.70A.040, such development regulations shall be  
17 adopted on or before September 1, 1991. For the remainder of the counties and cities, such  
18 development regulations shall be adopted on or before March 1, 1992.

19 (3) Such counties and cities shall review these designations and development  
20 regulations when adopting their comprehensive plans under RCW 36.70A.040 and  
21 implementing development regulations under RCW 36.70A.120 and may alter such  
22 designations and development regulations to insure consistency.

23 \*\*\*

24 Board Analysis and Findings

25 Petitioner argues that by allowing twice the development density on the 770 acres east of  
26 the Birch Bay UGA, rezoned from R-10 to R-5, the County failed to protect ALLTCS  
27 (agricultural lands of long term commercial significance).<sup>12</sup> Petitioner states that County  
28  
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31

32 <sup>12</sup> Petitioner's Opening Brief at 8.



1 records of property within the rezone area show parcels that qualify for ALLTCS and that  
2 should have been protected.<sup>13</sup>

3  
4 In response, the County argues Petitioner has failed to prove the rezone in this case fails to  
5 protect ALLTCS. The County asserts Petitioner incorrectly refers to land subject to the APO  
6 (agricultural protection overlay) as ALLTCS when, in fact, the County Comprehensive Plan  
7 provides that only the lands designated as Agriculture are GMA designated ALLTCS.<sup>14</sup>

8  
9 The County points out that maps 18 and 19 of the plan were amended in 1999 to clarify that  
10 lands designated as Agriculture in the Comprehensive Plan were GMA designated  
11 agricultural lands and lands subject to APO restrictions were not. The County argues RCW  
12 36.70A.060 only requires the protection of GMA designated agricultural lands and because  
13 land subject to the APO are not GMA designated agricultural lands there has been no  
14 failure to comply with the statute.

15  
16  
17 It appears Petitioner does not recognize that, while the lands in question are subject to the  
18 County's APO, it does not follow that these lands are necessarily ALLTCS.

19  
20 As this Board noted in Stalheim et al. v. Whatcom County, WWGMHB No. 10-2-0016c, FDO  
21 at 24 (4/8/11):

22       Petitioners assume that lands within the Agricultural Protection Overlay (APO)  
23       are Ag Lands of LTCS and that by removing this overlay, as shown on the  
24       amended land use maps, the County thereby "de-designated" such lands. **As**  
25       **Martin admits, WCC 20.38, Agriculture Protection Overlay, "never explicitly**  
26       **states that APO lands subject to its protection are actually GMA resource**  
27       **lands designated under RCW 36.70.170."** In fact, the APO designation is  
28       much broader than that, and includes "all rural lands designated R-5A or R-  
29       10A on the official zoning map" outside a UGA and held in parcels of 20  
30       acres or larger. (emphasis added)

31 <sup>13</sup> The Board notes that in support of this statement, Petitioner cites Exhibits A-H of his Motion for Official  
32 Notice and to Supplement. That Motion was denied as to Exhibits G and H and they will not be considered in  
this appeal.

<sup>14</sup> County Brief at 5.

1 Petitioner makes the same error here in arguing that by increasing the density on land  
2 within the APO, the County failed to protect ALLTCS lands. In fact, the record indicates  
3 these 770 acres are not ALLTCS, merely that they were subject to the APO.  
4

5  
6 As the County notes, the very regulations that make these parcels subject to the APO were  
7 specifically held as compliant with the GMA's requirements to conserve and protect  
8 agricultural lands in *Wells, et al. v. Whatcom County*, WWGMHB No. 97-2-030c, FDO  
9 (January 16, 1998). The County fulfilled its obligation to designate resource land including  
10 ALLTCS in 1997, and the adequacy of these designations is not before the Board. Its  
11 development regulations adopted to protect agricultural lands were upheld and those  
12 provisions both then and now applied to R5 and R10 lands meeting the criteria of the  
13 ordinance.<sup>15</sup> The rezone in this case did not amend GMA compliant APO development  
14 regulations originally adopted in 1997 to protect agriculture. Those provisions apply to the  
15 area at issue when zoned R10 and they continue to apply now that the area is zoned R5.  
16  
17

18 Based on the foregoing, the Board finds Petitioner has failed to carry his burden to  
19 demonstrate Ordinance 2010-065's rezone of 770 acres from R-10 to R-5 was clearly  
20 erroneous.  
21

## 22 Conclusion

23 The Board concludes Petitioner failed to carry his burden of proof in demonstrating the  
24 County's action in adoption Ordinance 2010-065 violated RCW 36.70A.060.  
25

## 26 **B. Public Participation Process**

### 27 Applicable Law

28 RCW 36.70A.140 provides, in part:  
29  
30  
31

32 <sup>15</sup> County Brief at 7.

1 Each county and city that is required or chooses to plan under RCW 36.70A.040  
2 shall establish and broadly disseminate to the public a public participation  
3 program identifying procedures providing for early and continuous public  
4 participation in the development and amendment of comprehensive land use  
5 plans and development regulations implementing such plans. The procedures  
6 shall provide for broad dissemination of proposals and alternatives, opportunity  
7 for written comments, public meetings after effective notice, provision for open  
8 discussion, communication programs, information services, and consideration of  
9 and response to public comments. . . . Errors in exact compliance with the  
10 established program and procedures shall not render the comprehensive land  
11 use plan or development regulations invalid if the spirit of the program and  
12 procedures is observed.

13 Board Analysis and Findings

14 Petitioner appears to suggest the County has violated GMA's public participation  
15 requirements due to the insufficiency of its staff analysis. Petitioner states that because the  
16 County's SEPA determination and staff analysis did not find consistency with the  
17 Comprehensive Plan and failed to analyze the effects of the upzone on protection of lands  
18 qualifying as ALLTCS, the public was deprived of an opportunity to comment upon these  
19 effects.<sup>16</sup>

20 In response to Petitioner's public participation arguments, the County argues Petitioner has  
21 failed to cite a single provision of the GMA that requires a parcel by parcel analysis to  
22 determine if any parcels within the rezoned area were subject to APO restrictions. Instead,  
23 the County argues, the public was appropriately notified of the proposed action through the  
24 notices of the public hearings and the legal notice of the SEPA threshold determination.<sup>17</sup>

25  
26 The Board finds the Petitioner has failed to carry his burden to demonstrate the County did  
27 not comply with (unspecified) provisions of the GMA's public participation requirements.  
28 While the Petitioner has alleged a violation of RCW 36.70A.140 in his Petition for Review,  
29 nothing in his briefing articulates how that section was violated. This section of the GMA  
30

31  
32 <sup>16</sup> Petitioner's Opening Brief at 8.

<sup>17</sup> County Brief at 8.

1 requires jurisdictions to establish a public participation program providing for early and  
2 continuous public participation in the development and amendment of comprehensive plans  
3 and development regulations implementing those plans. Petitioner has pointed to nothing in  
4 the record that would demonstrate that the County failed to comply with this section. If, as  
5 the County infers, Petitioner is basing his public participation challenge on the County's  
6 failure to do a parcel by parcel analysis of the rezoned area, Petitioner would need to  
7 demonstrate that such level of analysis was required by the GMA. To instead allege that  
8 the failure to do this level of analysis is a public participation violation mistakenly assumes a  
9 GMA violation that has not been proven. Therefore, Petitioner's public participation  
10 challenge, founded on this allegation of insufficient staff analysis, fails.  
11

### 12 Conclusion

13 The Board concludes Petitioner failed to carry his burden of proof in demonstrating the  
14 County's action in adoption Ordinance 2010-065 violated GMA's public participation  
15 requirements.  
16

## 17 **C. State Environmental Policy Act (SEPA)**

### 18 Applicable Law

19 RCW 43.21C.030, in pertinent part, provides that cities and counties shall:  
20

21 (c) Include in every recommendation or report on proposals for legislation and  
22 other major actions significantly affecting the quality of the environment, a  
23 detailed statement by the responsible official on:  
24

25 (i) the environmental impact of the proposed action;  
26

27 (ii) any adverse environmental effects which cannot be avoided should the  
28 proposal be implemented;  
29

30 (iii) alternatives to the proposed action;  
31

32 (iv) the relationship between local short-term uses of the environment and the  
maintenance and enhancement of long-term productivity; and

1  
2 (v) any irreversible and irretrievable commitments of resources which would  
3 be involved in the proposed action should it be implemented;

4 (d) Prior to making any detailed statement, the responsible official shall  
5 consult with and obtain the comments of any public agency which has jurisdiction  
6 by law or special expertise with respect to any environmental impact involved.  
7 Copies of such statement and the comments and views of the appropriate  
8 federal, province, state, and local agencies, which are authorized to develop and  
9 enforce environmental standards, shall be made available to the governor, the  
10 department of ecology, the ecological commission, and the public, and shall  
11 accompany the proposal through the existing agency review processes;

12 (e) Study, develop, and describe appropriate alternatives to recommended  
13 courses of action in any proposal which involves unresolved conflicts concerning  
14 alternative uses of available resources;

15 (f) Recognize the worldwide and long-range character of environmental  
16 problems and, where consistent with state policy, lend appropriate support to  
17 initiatives, resolutions, and programs designed to maximize international  
18 cooperation in anticipating and preventing a decline in the quality of the world  
19 environment;

20 (g) Make available to the federal government, other states, provinces of  
21 Canada, municipalities, institutions, and individuals, advice and information  
22 useful in restoring, maintaining, and enhancing the quality of the environment;

23 (h) Initiate and utilize ecological information in the planning and development  
24 of natural resource-oriented projects.

25 Board Analysis and Findings

26 Petitioner argues that because the County's SEPA determination and its staff analysis did  
27 not find consistency with the Comprehensive Plan, and because the SEPA determination  
28 and staff analysis did not analyze the effects of the upzone on protection of lands qualifying  
29 for ALLTCS, and because these failures deprive the public of an opportunity to comment  
30 upon these effects, the County's action violates SEPA.<sup>18</sup>

31  
32 <sup>18</sup> Petitioner's Brief at 8.

1 The County points out Petitioner fails to cite a single provision of RCW 43.21C that has  
2 been violated and has failed to establish the County's SEPA process was clearly erroneous.  
3 It notes that, following the procedure required by both state and county law, the SEPA  
4 official issued a threshold determination, a Determination of Non-Significance (DNS), which  
5 determination is to be accorded substantial weight.<sup>19</sup> Because the proper SEPA procedure  
6 was followed the only potential issue would be whether the DNS was appropriate. As the  
7 County notes, to invalidate the DNS the Petitioner must present evidence to establish that a  
8 probable significant adverse environmental impact exists. The County argues there has  
9 been no such evidence presented.  
10  
11

12 We review a DNS under the clearly erroneous standard. RCW 36.70A.320(3). The DNS was  
13 prepared and dated July 9, 2009.<sup>20</sup> No conditions were imposed for the DNS issuance.  
14 Pursuant to RCW 43.21C.090, that determination shall be accorded substantial weight.  
15  
16

17 To meet his burden of proof, Petitioner must present actual evidence of probable,  
18 significant, adverse impacts resulting from the proposed action.<sup>21</sup> Petitioner points to no  
19 evidence in the record establishing the environmental impacts of Ordinance 2010-065 rise  
20 to a level of significance. Absent such evidence in the record, there is no basis for the  
21 Board to find the County's issuance of the DNS in error.  
22

### 23 Conclusion

24 The Board concludes Petitioner failed to carry his burden of proof in demonstrating the  
25 County's action in adoption Ordinance 2010-065 violated RCW 43.21C.  
26

## 27 **D. Consistency of Rezone with Comprehensive Plan Goals and Policies**

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29  
30

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31 <sup>19</sup> County Brief at 9.

32 <sup>20</sup> Ex. P-18,

<sup>21</sup> *Boehm v. City of Vancouver*, 111 Wn.App. 711, 719 (2002)

1 Applicable Law

2  
3 RCW 36.70A.040(3) provides, in pertinent part:

4  
5 (3) Any county or city that is initially required to conform with all of the  
6 requirements of this chapter under subsection (1) of this section shall take  
7 actions under this chapter as follows: \* \* \* (d) if the county has a population of  
8 fifty thousand or more, the county and each city located within the county shall  
9 adopt a comprehensive plan under this chapter and development regulations that  
10 are consistent with and implement the comprehensive plan on or before July 1,  
11 1994, and if the county has a population of less than fifty thousand, the county  
12 and each city located within the county shall adopt a comprehensive plan under  
this chapter and development regulations that are consistent with and implement  
the comprehensive plan by January 1, 1995, \* \* \*

13 RCW 37.70A.130(1)(d), although cited in Issue 2 was neither cited nor argued in Petitioner's  
14 briefing. The Board notes that this section provides:

15 (d) Any amendment of or revision to a comprehensive land use plan shall  
16 conform to this chapter. Any amendment of or revision to development  
17 regulations shall be consistent with and implement the comprehensive plan.

18  
19 Board Analysis and Findings

20 Petitioner argues the Ordinance 2010-065 rezone of land from R-10 to R-5 was inconsistent  
21 with adopted Comprehensive Plan policies disfavoring rezones from R-10 to R-5.<sup>22</sup> This, he  
22 asserts, violates GMA requirements for consistency between development regulations and  
23 the comprehensive plan.  
24

25 Petitioner further argues the rezone was inconsistent with Policy 2DD-10 which discourages  
26 rezones from one dwelling unit per ten acres (R10A) to one dwelling unit per five acres  
27 (R5A).  
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32 <sup>22</sup> Petitioner's Prehearing Brief at 1.

1 The County states Petitioner's argument that the rezone was inconsistent with Policy 2DD-  
2 10 is unfounded and furthermore moot because the County has recently removed that  
3 policy from its plan.<sup>23</sup>  
4

5 With regard to whether the rezone is inconsistent with Policy 2K-1, the County argues that  
6 Petitioner has failed to prove that any inconsistency exists between the Comprehensive  
7 Plan and the rezone action in this case. The County notes Policy 2 K-1 is entitled "Flooding"  
8 and is exclusively focused on the flooding of rivers and streams in Whatcom County,  
9 particularly the Nooksack River. The County argues the approximately 770 acre rezone ,  
10 including 92 acres in the floodplain, does not preclude achievement of Goal 2K or any of its  
11 supporting policies such as 2K-1.  
12

13  
14 In response to the County argument that Policy 2K-1 is limited to the Nooksack River,  
15 Petitioner points out that nothing in this policy limits its application, and in fact it applies  
16 county-wide.  
17

18 Goal 2 K and Policy 2K-1

19 Whatcom County Comprehensive Plan Goal 2K provides: "Discourage development in  
20 areas prone to flooding."  
21

22 Policy 2K-1 provides: "Limit land in one-hundred year floodplains to low-intensity land uses  
23 such as open space corridors or agriculture."  
24

25 The Board agrees with Petitioner that nothing in Goal 2K or Policy 2K-1 restrict their  
26 applicability to areas within the Nooksack River floodplain. While there is language in the  
27 Comprehensive Plan addressing the Nooksack River floodplain preceding the Goal and  
28 Policy in question, the Goal and Policy fall under the section heading "Flooding" which  
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31  
32 <sup>23</sup> County Brief at 10.



1 presumptively addresses the entire County. Therefore we conclude that Goal 2K and Policy  
2 2K-1 apply county-wide.

3  
4 In analyzing whether there is a lack of consistency between a plan provision and a  
5 development regulation, arising to a violation of the GMA, this Board has held that such a  
6 violation results if the development regulations preclude attainment of planning goals and  
7 policies.<sup>24</sup> Here, County staff correctly concluded that: "Rezoning the subject areas to R(5)  
8 would provide for a greater intensity of land use and further subdivisions where divisions are  
9 currently prohibited. Rezoning these properties would be in direct conflict with Policy 2K-  
10 1."<sup>25</sup> The Board agrees that, at least as to the 92 of the 770 acres rezoned that are in the  
11 floodplain, a doubling of the density *encourages* development in the floodplain and directly  
12 conflicts with the policy to limit land in one-hundred year floodplains to low-intensity uses  
13 such as open space corridors or agriculture. The County argues that in areas outside of  
14 UGAs that are not suitable for agricultural or other resource land designation, such as this  
15 area in Birch Bay, the only remaining use is rural zoning, and both the R5 and R10 zones  
16 allow for the same low intensity uses. This may well be true, and the County is under no  
17 obligation to rezone the property as agriculture or open space. Nevertheless, a rezone from  
18 R10 to R5 moves in a direction directly contrary to Policy 2K-1. This rezone precludes  
19 attainment of Goal 2K and Policy 2K-1.  
20  
21  
22

### 23 Policy 2DD-10

24 Whatcom County Comprehensive Plan Policy 2DD-10 provided:

25 "Rezones from one dwelling unit per ten acre (R10A) zoning districts to  
26 one dwelling unit per five acre (R5A) zoning districts should be discouraged."  
27

28 The County points out this plan policy has since been removed, rendering this issue moot.  
29 As Petitioner points out, however, the focus of the Board inquiry is on the policies and  
30  
31

32 <sup>24</sup> See, Heikkala/Cook v. City of Winlock, WWGMHB No. 09-2-0013c, FDO, p. 35 (10/8/09).

<sup>25</sup> August 12, 2010 Staff Report. Ex. P-9, p4.

1 record in place at the time of the County action. Petitioner suggests that allowing the  
2 County to avoid challenges to the Board by repeal of potentially conflicting plan provisions  
3 would only encourage the County to eliminate compliant policies after taking rezone actions  
4 that conflict with those policies. While Petitioner suggests the County "refashioned its rural  
5 element just so it can argue to the Board in its response brief here that rezones from R-10 to  
6 R-5 are GMA compliant", this seems a bit of a stretch. The extensive findings of Ordinance  
7 2010-13 which removed Policy 2DD-10 among a host of other changes demonstrate that it  
8 was adopted in large part in response to the order of this Board in Case No. 05-2-0013  
9 which has, at last, been remanded from the State Supreme Court.<sup>26</sup> The fact that the  
10 County, in reevaluating its rural densities, decided to remove Policy 2DD-10, does not  
11 suggest a sinister motive to evade compliance with the GMA.  
12

13  
14 However, the Board must recognize the fact of the County's subsequent repeal of Policy  
15 2DD-10. In considering this issue, the Board must determine whether the issue has been  
16 rendered moot, which would make any Board decision on this point purely advisory.  
17

18 On the topic of mootness, our State Supreme Court has held that "It is a general rule that,  
19 where only moot questions or abstract propositions are involved, . . . the appeal . . . should  
20 be dismissed." *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). A  
21 recognized exception to this general rule lies within the court's discretion when "matters of  
22 continuing and substantial public interest are involved." *Sorenson*, at 558.  
23

24  
25 In 1972, the Court adopted criteria to consider in deciding whether a matter, though moot, is  
26 of continuing and substantial public interest and thus reviewable. The three factors  
27 considered essential are: (1) whether the issue is of a public or private nature; (2) whether  
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32 <sup>26</sup> See, Ordinance 2010-013, attached as Ex. H to the County's Brief.

1 an authoritative determination is desirable to provide future guidance to public officers; and  
2 (3) whether the issue is likely to recur.<sup>27</sup>

3  
4 Here, the amendment of the County Comprehensive Plan is clearly a public matter.  
5 However, as to the other two factors, we do not find this is a matter of continuing and  
6 substantial public interest. A determination of the County's compliance with repealed Policy  
7 2DD-10 would not be of guidance to other public officers because the policy is likely to be  
8 unique to Whatcom County, and also because cities and counties are vested with great  
9 discretion in the adoption and wording of their plan policies. As to whether the issue is likely  
10 to recur, the Board is not persuaded, as Petitioner suggests, that the County repealed  
11 Policy 2DD-10 to avoid review. Thus, the likelihood the issue will recur is slight.  
12 Consequently, the Board finds and concludes that the issue of consistency between  
13 Ordinance 2010-065 and Policy 2DD-10 is moot.  
14

15  
16 The Board finds Petitioner failed to make any argument in support of the contention that the  
17 County's action was inconsistent with Plan Policy 2DD-5, Goal 8A and Policy 8A4. Merely  
18 referencing "goals and policies enumerated above and in Martin's Petition for Review"<sup>28</sup>  
19 without any argument at all as to *how* the challenged action is inconsistent with those goals  
20 and policies is insufficient to carry Petitioner's burden of proof.  
21

## 22 Conclusion

23 The Board concludes the Petitioner carried his burden of proof in demonstrating the  
24 County's action in adoption Ordinance 2010-065 was inconsistent with Whatcom County  
25 Comprehensive Plan Goal 2K and Policy 2K-1. As to Policy 2DD-10, the Board finds the  
26 issue is moot as that Policy has been repealed.  
27

## 28 **E. Invalidity**

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30  
31

32 <sup>27</sup> *In re Cross*, 99 Wn.2d 373 at 377(1983)(citing *Sorenson v. Bellingham* , at 558).

<sup>28</sup> Petitioner's Opening Brief at 8.

1  
2 Applicable Law

3 RCW 36.70A.302 provides:

4  
5 (1) The board may determine that part or all of a comprehensive plan or development  
6 regulations are invalid if the board:

7 (a) Makes a finding of noncompliance and issues an order of remand under RCW  
8 36.70A.300;

9 (b) Includes in the final order a determination, supported by findings of fact and  
10 conclusions of law, that the continued validity of part or parts of the plan or regulation  
11 would substantially interfere with the fulfillment of the goals of this chapter; and

12 (c) Specifies in the final order the particular part or parts of the plan or regulation that  
13 are determined to be invalid, and the reasons for their invalidity.

14  
15 Board Analysis and Findings

16 Petitioner argues the County's actions in Ordinance 2010-065 merit findings and  
17 conclusions by the Board that the action of the County substantially thwarts the goals and  
18 requirements of the GMA and an order of invalidity should issue.<sup>29</sup> In response, the County  
19 argues Petitioner has failed to meet the clearly erroneous standard on the issues presented,  
20 and therefore has failed to meet the higher standard to prove invalidity.<sup>30</sup>  
21

22 In this case the Board has found the County's rezone to be inconsistent with Plan Goal 2K  
23 and Policy 2K-1. However, Petitioner has not demonstrated that this inconsistency  
24 substantially interferes with the goals of the GMA. In fact, Petitioner has not presented any  
25 argument tying this lack of consistency to any particular GMA goal. In the absence of proof  
26 of such substantial interference, the Board declines to impose invalidity.  
27

28  
29 Conclusion  
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<sup>29</sup> Id.

<sup>30</sup> County Brief at 12.

1 The Board concludes the Petitioner failed to carry his burden of proof in demonstrating the  
2 County's action in adopting Ordinance 2010-065 warrants the imposition of an order of  
3 invalidity.

#### 4 5 **VI. ORDER**

6 Based on the foregoing, the Board finds Petitioner failed to carry his burden of proof in  
7 demonstrating that Ordinance 2010-065 violates the Growth Management Act except that  
8 Petitioner has demonstrated that the rezone of 92 acres in the 100 year floodplain from R10  
9 to R5 conflicts with Goal 2K and Policy 2K-1.

10  
11 The County is ordered to bring its Comprehensive Plan and Development Regulations into  
12 compliance with the Growth Management Act pursuant to this decision within 90 days. The  
13 following schedule for compliance, briefing and hearing shall apply:  
14

15

16 Compliance Due on identified area of noncompliance	October 24, 2011
17 Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	October 31, 2011
18 Objections to a Finding of Compliance	November 14, 2011
19 Response to Objections	November 28, 2011
20 Compliance Hearing – telephonic 21 360 407-3780 pin 634363#	December 14, 2011 10:00 a.m.

22

23 So ORDERED this 22<sup>nd</sup> day of July, 2011.

24  
25  
26 \_\_\_\_\_  
James McNamara, Board Member

27  
28  
29 \_\_\_\_\_  
William Roehl, Board Member

30  
31  
32 \_\_\_\_\_  
Nina Carter Board Member

1 Note: The parties are reminded that the Board is now a section of the Environmental and  
2 Land Use Hearings Office – ELUHO – with a new e-mail address [western@eluhho.wa.gov](mailto:western@eluhho.wa.gov).  
3 The Board's Rules of Practice and Procedure have been updated effective July 21, 2011,  
4 and are now found at Chapter 242-03 WAC.

5 This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a  
6 motion for reconsideration pursuant to WAC 242-03-830.<sup>31</sup>

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24 <sup>31</sup>Reconsideration. Pursuant to WAC 242-03-830, you have ten (10) days from the date of mailing of this Order to  
25 file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any  
26 argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original  
27 and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of  
28 record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-03-240(1).  
29 The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

30 Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as  
31 provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior  
32 court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement.  
The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the  
Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW  
34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means  
actual receipt of the document at the Board office within thirty days after service of the final order. A petition for  
judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)